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TAN ONG BAN v. TEOH KIM HENG

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
MD RAUS SHARIF PCA
ABDULL HAMID EMBONG FCJ
B HASAN LAH FCJ
ABU SAMAH NORDIN FCJ
[CIVIL APPEAL NO: 02(f)-53-06-2014(P)]
4 FEBRUARY 2016

C ***LAND LAW:*** *Indefeasibility of title and interests – Beneficial ownership – Purchaser paid full purchase price and executed all formal documents to effect registration – Whether purchaser accorded full rights and privileges of legal owner over property even before registration – Whether purchaser assumed position of beneficial owner having right in rem over property – National Land Code, s. 340(1)*

D ***LAND LAW:*** *Indefeasibility of title and interests – Beneficial ownership – Principle enunciated in Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd – Whether applied equally to negotiated contracts as well as statutorily formatted contract – Whether intended to protect purchaser*

E ***LAND LAW:*** *Indefeasibility of title and interests – Non-registration – Non-issuance of strata title – Whether s. 340(1) of National Land Code applied to immovable strata property where no register document of title issued – Whether s. 340(1) applied to registered title or interest*

CONTRACT: *Sale and purchase of land – Enforceability – Transaction involving*
F *landed property – Whether governed by principles of law of contract until registration of title under National Land Code – Whether purchaser's right contractual in nature – Whether purchaser acquired right ad rem or right in personam*

Juara Aspirasi (M) Sdn Bhd, the second defendant in the High Court ('the
G second defendant'), was a licensed housing developer undertaking the construction and development of the property, the subject matter of the action. A sale and purchase agreement was entered into between the second defendant as the vendor, the appellant ('the plaintiff') as the purchaser and Goldencolt (M) Sdn Bhd as the proprietor of the land that was being
H developed ('the first SPA'). Subsequently, the second defendant entered into a fresh sale and purchase agreement in respect of the property with one Mohd Ismail ('the second SPA') with the agreed purchase price of RM50,000 fully settled. Thereafter, Mohd Ismail sold the property to the respondent ('the first defendant') *vide* a sale and purchase agreement ('the third SPA'). The
I plaintiff thus commenced a proceeding in the High Court against the defendants. The plaintiff stated that he received a letter from a representative of the second defendant terminating the first SPA, which he had objected to and returned the enclosed cheque for RM5,250 to the developer. By another

letter, the developer reasserted the termination and enclosed the cheque again which was again returned by the plaintiff. Therefore, it was the plaintiff's contention that the first SPA was valid and enforceable. The High Court found in favour of the plaintiff and held that the first SPA was valid and subsisting and enforceable and the alleged subsequent disposal of the property by Mohd Ismail to the first defendant was invalid, null and void. On appeal by the first defendant, the Court of Appeal ruled that the first defendant was a *bona fide* purchaser for value without notice and was thus clothed with the statutory protection under s. 340 of the National Land Code ('NLC') in that the first defendant had acquired an indefeasible title to the property. Leave was granted to the plaintiff to appeal on the following questions of law: (i) whether the principle of beneficial ownership established by the decision of the Federal Court in *Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd* ('*Borneo Housing*') applied to the statutory form of contract prescribed by the housing developers legislation; and (ii) whether s. 340(1) of the NLC applied to immovable strata property in respect of which no register document of title had been issued by the appropriate authority.

Held (dismissing appeal with costs)
Per Arifin Zakaria CJ delivering the judgment of the court:

(1) According to the principle of beneficial ownership, when a purchaser of a property has performed his or her contractual obligation upon the full settlement of the purchase price, besides executing all the formal documents to effect the registration of ownership, equity accords him or her with all the rights and privileges of a legal owner over the property. The purchaser thus enjoys the benefit of being the owner of the acquired property even though he has yet to become its registered owner. In the circumstances, the vendor becomes a bare trustee for the purchaser in respect of the transacted property, while the purchaser assumes the position of beneficial owner having right *in rem* over the property. (paras 34 & 37)

(2) The principle of beneficial ownership as enunciated in *Borneo Housing* applies equally to both negotiated contracts as well as statutorily formatted contract. The intention of the Act as well as all the subsequent Enactments and the subsidiary legislations is to merely protect the intending purchaser. It is not intended to abrogate or undermine the rights of purchaser under the common law or in equity. (paras 41 & 42)

(3) It is trite that in a transaction involving landed property, the principle under the law of contract will govern the sale transaction until registration of title is effected under the NLC. Any transaction which was not done in accordance with the then existing law relating to registration of title, conferred no real right to the land but merely a

A contractual right. Based on the ordinary sale and purchase transaction, the purchaser will acquire a right *ad rem* or a right *in personam*. These rights will be conferred to the purchaser immediately after contracting parties entered into a contract for the sale and purchase of property. (paras 46 & 48)

B **(4)** The plaintiff was at best clothed with a right *ad rem* or a right *in personam* as against the second defendant upon the execution of the first SPA and payment of the sum of RM5,250 to the second defendant. The plaintiff's rights rested solely in contract as against the second defendant and no cause of action could lie against the first defendant who was a complete C stranger to the contract. The plaintiff was unfortunately left without remedy as the second defendant had been wound up. (paras 50 & 51)

(5) The first defendant acquired his right through Mohd Ismail and having paid the full purchase price, in law, he assumed the position of a beneficial owner. The fact that Mohd Ismail was the brother of one of D the director of the second defendant did not automatically give rise to a conclusion that Mohd Ismail had notice of the earlier SPA. There was no evidence to show that the information had ever been communicated to Mohd Ismail or the first defendant. Further, there was not an iota of evidence to show that there had been a collusion or conspiracy between E the first defendant and Mohd Ismail. In the circumstances, the first defendant was an innocent purchaser for value without notice and as the beneficial owner of the property, the first defendant enjoyed a right *in rem* over the property. The first question was thus answered in the positive. (paras 52 & 53)

F **(6)** Section 340(1) of the NLC only speaks of registered title or interest. Therefore, the proviso to s. 340(3) of the NLC did not apply to the instant case as the strata title was yet to be issued at the material date. Hence, the second question was answered in the negative. (paras 21 & 54)

G ***Bahasa Malaysia*** *Headnotes*

Juara Aspirasi (M) Sdn Bhd, defendan kedua di Mahkamah Tinggi ('defendan kedua'), ialah pemaju perumahan berlesen yang melaksanakan pembinaan dan pembangunan hartanah yang menjadi hal perkara tindakan ini. Satu H perjanjian jual beli dimeterai antara defendan kedua sebagai penjual, perayu ('plaintif') sebagai pembeli dan Goldencolt (M) Sdn Bhd sebagai pemilik tanah yang sedang dibangunkan ('PJB pertama'). Kemudian, defendan kedua memasuki perjanjian jual beli baru berkaitan dengan hartanah tersebut dengan seorang yang bernama Mohd Ismail ('PJB kedua') dengan harga belian sejumlah RM50,000 dilangsaikan sepenuhnya. Selepas itu, Mohd I Ismail menjual hartanah tersebut kepada responden ('defendan pertama') melalui satu perjanjian jual beli ('PJB ketiga'). Oleh itu plaintif memulakan

prosiding di Mahkamah Tinggi terhadap defendan-defendan. Plaintif menyatakan bahawa dia menerima surat daripada wakil defendan kedua menamatkan PJB pertama, yang dibantahnya dan memulangkan cek yang disertakan berjumlah RM5,250 kepada pemaju. Melalui satu lagi surat, pemaju menegaskan sekali lagi penamatan dan menyertakan semula cek tersebut yang telah dipulangkan sekali lagi oleh plaintif. Oleh itu, plaintif menghujahkan bahawa PJB pertama masih sah dan kekal dan berkuat kuasa dan pelupusan hartanah terkemudian oleh Mohd Ismail kepada defendan pertama tidak sah dan batal. Atas rayuan oleh defendan pertama, Mahkamah Rayuan memutuskan bahawa defendan pertama adalah pembeli *bona fide* bagi nilai tanpa notis dan dengan itu dilindungi secara statutori di bawah s. 340 Kanun Tanah Negara ('KTN') di mana defendan pertama telah memperoleh hak milik tak boleh sangkal bagi hartanah tersebut. Kebenaran diberikan kepada plaintif untuk merayu atas persoalan undang-undang seperti berikut: (i) sama ada prinsip milikan benefisial yang diputuskan oleh Mahkamah Persekutuan dalam kes *Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd* ('*Borneo Housing*') terpakai pada bentuk kontrak statutori yang dinyatakan dalam perundangan pemaju perumahan; dan (ii) sama ada s. 340(1) KTN terpakai pada hartanah strata tak boleh alih di mana daftar dokumen hak milik belum dikeluarkan oleh pihak berkuasa berkenaan.

Diputuskan (menolak rayuan dengan kos)
Oleh Arifin Zakaria KHN menyampaikan penghakiman mahkamah:

(1) Menurut prinsip milikan benefisial, apabila seseorang pembeli hartanah telah melaksanakan tanggungjawab kontraknya selepas penyelesaian penuh harga belian, selain memeterai kesemua dokumen rasmi untuk melaksanakan pendaftaran milikan, ekuiti memberikannya semua hak dan keistimewaan sebagai pemilik sah hartanah tersebut. Pembeli oleh itu menikmati faedah sebagai pemilik hartanah yang diperoleh walaupun dia belum lagi menjadi pemilik berdaftar. Dalam keadaan tersebut, penjual menjadi pemegang amanah sahaja bagi pembeli berkaitan dengan hartanah yang ditransaksikan, sementara pembeli berkedudukan sebagai pemilik benefisial yang mempunyai hak *in rem* terhadap hartanah tersebut.

(2) Prinsip milikan benefisial yang diketengahkan dalam kes *Borneo Housing* terpakai secara sama rata pada kontrak yang dirundingkan dan juga kontrak berdasarkan statutori. Niat Akta dan Enakmen-enakmen berikutnya dan undang-undang subsidiari hanya semata-mata untuk melindungi pembeli yang berminat. Ia tidak diniatkan untuk memansuhkan atau menjejaskan hak pembeli di bawah common law atau ekuiti.

(3) Adalah matan bahawa dalam transaksi yang melibatkan harta tanah, prinsip di bawah undang-undang kontrak menguasai transaksi jualan sehingga pendaftaran hak milik dilakukan di bawah KTN. Apa-apa

transaksi yang tidak dibuat menurut undang-undang berkaitan dengan pendaftaran hak milik pada masa itu, tidak memberikan apa-apa hak sebenar bagi tanah tersebut sebaliknya, hanya hak dari segi kontrak. Berdasarkan transaksi jual beli biasa, pembeli akan memperoleh hak *ad rem* atau hak *in personam*. Hak-hak ini akan diberikan kepada pembeli sebaik sahaja pihak-pihak berkontrak memasuki kontrak jual beli harta.

(4) Plaintif sebaiknya mempunyai hak *ad rem* atau hak *in personam* terhadap defendan kedua selepas pemeteraian PJB pertama dan bayaran jumlah RM5,250 kepada defendan kedua. Hak plaintif hanya terletak dalam kontrak terhadap defendan kedua dan tiada kausa tindakan terhadap defendan pertama iaitu orang asing dalam kontrak tersebut. Malangnya plaintif tidak boleh mendapat remedi kerana defendan kedua telah digulungkan.

(5) Defendan pertama memperoleh haknya daripada Mohd Ismail dan setelah membayar harga belian penuh, di bawah undang-undang, dia adalah pemilik benefisial. Fakta bahawa Mohd Ismail adalah adik kepada salah seorang pengarah defendan kedua tidak membangkitkan kesimpulan automatik bahawa Mohd Ismail mempunyai notis tentang PJB terdahulu. Tiada keterangan yang menunjukkan bahawa maklumat tersebut pernah dinyatakan kepada Mohd Ismail atau defendan pertama. Malahan tiada secebis keterangan pun yang menunjukkan bahawa terdapat pakatan sulit atau konspirasi antara defendan pertama dan Mohd Ismail. Dalam keadaan tersebut, defendan pertama adalah pembeli tidak bersalah tanpa notis bagi nilai dan sebagai pemilik benefisial hartanah tersebut, defendan pertama menikmati hak *in rem* terhadap hartanah tersebut. Oleh itu, persoalan pertama dijawab secara positif.

(6) Seksyen 340(1) KTN hanya menyebut tentang hak milik atau kepentingan berdaftar. Oleh itu, proviso s. 340(3) KTN tidak terpakai dalam kes ini kerana hak milik strata belum dikeluarkan pada tarikh berkenaan. Oleh itu, persoalan kedua dijawab secara negatif.

Case(s) referred to:

Bachan Singh v. Mahinder Kaur & Ors [1956] 1 LNS 14 HC ***(refd)***

Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd (Formerly known as Time Engineering Sdn Bhd) [1996] 2 CLJ 561 FC ***(foll)***

City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd [1987] 1 LNS 62 PC ***(refd)***

Hj Abdul Rahman And Another v. Mohamed Hassan [1917] AC 209 ***(refd)***

J Raju M Kerpaya @ Jayaraman M Kerpaya v. Kwong Yik Bank Bhd & Anor [1994] 2 CLJ 695 SC ***(refd)***

Kersah La'uisn v. Sikin Menan [1964] 1 LNS 57 HC ***(refd)***

Loke Yew v. Port Swettenham Rubber Company Limited [1913] AC 491 PC ***(refd)***

Lysaght v. Edwards (1875-76) 2 Ch D 499 ***(refd)***

M&J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 14 SC ***(refd)***

Ong Chat Pang & Anor v. Valliappa Chettiar [1971] 1 LNS 96 FC ***(refd)***
Peninsular Land Development Sdn Bhd v. K Ahmad [1969] 1 LNS 124 FC ***(refd)***
Raja Lob Sharuddin Raja Ahmad Terzali & Ors v. Sri Seltra Sdn Bhd [2008] 2 CLJ 284 CA ***(refd)***
Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd [1985] 1 CLJ 541; [1985] CLJ (Rep) 266 FC ***(refd)***
SEA Housing Corporation Sdn Bhd v. Lee Poh Choo [1982] 1 LNS 22 FC ***(refd)***
Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***
Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors [1974] 1 LNS 175 FC ***(refd)***
Yap Ham Seow v. Fatimawati Ismail & Ors And Another Appeal [2013] 9 CLJ 577 CA ***(refd)***
Yeo Long Seng v. Lucky Park (Pte) Ltd [1970] 1 LNS 174 HC ***(refd)***

Legislation referred to:
Federal Constitution, arts. 5(1), 8(1), 13
National Land Code, s. 340(1), (2)(b), (3)

For the appellant - Gopal Sri Ram (Chuah Yih Chuan & David Yii Hee Kiet with him); M/s Chooi, Sae & Lim
For the respondent - Baldef Singh Bhar (Simon Muralli with him); M/s Lio & Partner

Reported by S Barathi

JUDGMENT

Arifin Zakaria CJ:

Introduction

[1] This is an appeal by the appellant (the plaintiff in the High Court) against the decision of the Court of Appeal in allowing the respondent's (the first defendant in the High Court) appeal. The Court of Appeal ruled that the first defendant was a *bona fide* purchaser for value without notice, hence is clothed with the statutory protection accorded by s. 340 of the National Land Code (NLC). That being the case, the Court of Appeal held that the first defendant has acquired an indefeasible title to the property.

[2] The second defendant named in the High Court proceeding was a developer company known as Juara Aspirasi (M) Sdn Bhd (the second defendant in the High Court), who is not a party before us. For ease of reference, we shall refer to the parties as they were cited in the High Court.

Question Of Law

[3] On 19 May 2014, this court granted leave to the plaintiff to appeal against the decision of the Court of Appeal on the following two questions of law:

A (a) Whether the principle of beneficial ownership established by the decision of the Federal Court in *Borneo Housing Mortgage Finance Berhad v. Time Engineering Berhad* [1996] 2 AMR 1537 applies to the statutory form of contract prescribed by the Housing Developers legislation.

B (b) Whether section 340(1) of the National Land Code 1965 applied to immovable strata property in respect of which no register document of title has been issued by the appropriate authority.

Background Facts

[4] The subject matter of the dispute is an apartment unit known as Unit C 15-6, Level 15, Building No. Block A, Villa Mas Ewani Apartments, Bandar Jelutong, Penang ("the property"). At all material times, prior to its liquidation, the second defendant was a licensed housing developer undertaking the construction and development of the property.

[5] On 3 July 1996, a sale and purchase agreement was entered into D between the second defendant as the vendor, the plaintiff as the purchaser and Goldencolt (M) Sdn Bhd as the proprietor of the land that was being developed. Among the terms of the sale and purchase agreement ("the first SPA") were:

E (i) the agreed purchase price of the property was RM35,000; and

(ii) the purchase price is to be settled in the manner spelt out in the Fourth Schedule to the agreement.

The first SPA was in the statutory format prescribed under the Housing Development (Control And Licensing) Act 1966 ("the Act"). F

[6] On 1 November 2002, the second defendant entered into a fresh sale and purchase agreement in respect of the property with one Mohd Ismail Bin Md Ibrahim ("Mohd Ismail") ("the second SPA"). The agreed purchase price was RM50,000 which was fully settled. Thereafter, on 31 May 2004, G Mohd Ismail sold the property to the first defendant *vide* a sale and purchase agreement entered into and signed on the same day ("the third SPA"). Upon obtaining vacant possession of the property, the first defendant commenced renovation work on the property.

[7] On 20 January 2006, the plaintiff claimed he visited the property and H discovered that the first defendant was carrying out renovation works on the property. He then lodged a police report alleging that he was the owner of the property and that someone had trespassed into the property.

[8] The plaintiff through his solicitor issued a notice of demand dated 10 March 2006 to the solicitor of the first defendant. The solicitor for the I first defendant responded, in which it was categorically stated that the first defendant was the beneficial owner of the property, having purchased the property from Mohd Ismail for a valuable consideration. It was also pointed

out in the letter that if there was any grain of truth in the allegation made by the plaintiff, his grievance ought to be directed towards the vendor with whom he signed the sale and purchase agreement, and not the first defendant.

Proceedings In High Court

[9] In his amended statement of claim, the plaintiff states that he had received a letter dated 12 May 2004 from 'Januari Property Sdn Bhd', purportedly representing the second defendant, informing him that the first SPA had been terminated and enclosing a cheque for RM5,250. However, by a letter dated 19 May 2004, the plaintiff objected to the termination on the ground that the developer had no valid reason to terminate the first SPA. He returned the cheque to the developer. By another letter dated 3 June 2004, the developer reasserted the termination and again enclosed the said cheque. Again the plaintiff returned the cheque.

[10] The plaintiff contended that the first SPA was valid and enforceable and that the developer had no right to sell the property to another party. The plaintiff then commenced this action against the defendants herein. In summary, the plaintiff's claim was for a number of declaratory reliefs with regard to the legal status of the three SPAs and for an injunction to stop the first defendant from trespassing into the property.

[11] In opposing the claim, the first defendant averred that he was neither a party nor privy to the first and second SPAs. He contended that he had paid the full purchase price to Mohd Ismail and Mohd Ismail had, with the consent of the developer, assigned all the rights over the property to him *vide* a deed of assignment dated 20 May 2005. Upon obtaining possession, he commenced renovation works. He alleged that he is a *bona fide* purchaser for value having good and inviolable interest in the property.

[12] The second defendant was in liquidation and was represented at the High Court by an officer from the Insolvency Department. They took the stand not to defend the suit.

[13] The learned trial judge found in favour of the plaintiff and allowed the plaintiff's claim. He found that the first SPA remains valid and subsisting and enforceable. He also found that the alleged subsequent disposal of the property by Mohd Ismail to the first defendant was invalid, null and void. Since Mohd Ismail did not have any proprietary interest in the property accordingly, the first defendant, who purportedly entered into the third SPA with Mohd Ismail on 31 May 2004 could not have acquired any interest in the property ("*nemo dat quod non habet*"). Further, he also found that the first defendant was not protected by the doctrine of a *bona fide* purchaser for value as he failed to prove that he had fully paid the purchase price to Mohd Ismail who was never called to confirm receiving the payment from the first defendant.

A **Proceedings In Court Of Appeal**

[14] Aggrieved by the decision of the High Court, the first defendant appealed to the Court of Appeal. In allowing the first defendant's appeal, the Court of Appeal made the following findings:

B [22] We find no evidence to show that the appellant had acted in concert with Mohd Ismail to effect the disposition of the Property. It is apparent that the appellant had no knowledge about the first SPA and the second SPA.

[15] The Court of Appeal further held that:

C [23] We find that the appellant has shown that he was a *bona fide* purchaser for value without notice and therefore he is clothed with the statutory protection accorded by s. 340 NLC. Consequently the appellant has acquired an indefeasible title to the property. We agree with learned counsel for the appellant that the respondent's remedy would be against the developer for breach of contract.

D **The Issues Before This Court**

[16] In view of the submissions of counsel before us, we will first address Question No. 2. The question reads:

E Question 2

Whether section 340(1) of the National Land Code applied to immovable strata property in respect of which no register document of title has been issued by the appropriate authority.

Plaintiff's Submission

F **[17]** Learned counsel for the plaintiff submitted that the Court of Appeal committed a serious and fundamental error of law by misapplying s. 340 of the NLC to the facts of the present appeal. He submitted that, it is trite that s. 340 only applies where there exists a registered title or interest. This is reflected through its provision which begins with words:

G The title or interest of any person or body **for the time being registered as proprietor** ...

(emphasis added).

[18] He contended that, the provision confers upon the registered proprietor H or any person having registered title or interest in the land deferred indefeasibility. Under s. 340(2)(b) of the NLC, the registered proprietor who had acquired his title by registration of a void or voidable instrument does not acquire an indefeasible title. The indefeasibility is postponed until the time when a subsequent purchaser acquires the title in good faith for valuable I consideration. In other words, a registered proprietor, under a sale and purchase agreement, may or confer an indefeasible title to a *bona fide* purchaser for value even though he himself does not possess an indefeasible title. (See *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269; *Yap Ham Seow v. Fatimawati Ismail & Ors And Another Appeal* [2013] 9 CLJ 577).

[19] Learned counsel for the plaintiff contended that, in this case the strata title of the property is yet to be issued. Neither Mohd Ismail nor the first defendant has been registered as owner of the property. Therefore, s. 340 has no application to the present case.

Defendant's Submission

[20] Learned counsel for the first defendant agreed that the Court of Appeal had erred in relying on the proviso to s. 340(3) of the NLC. He conceded that the proviso has no relevance to the factual matrix of the case.

Our Finding To Question No. 2

[21] We entirely agree with the plaintiff's submission, as rightly conceded by learned counsel for the first defendant, the proviso to s. 340(3) of the NLC does not apply to the present case as the strata title is yet to be issued at the material date. This is premised on the fact that s. 340(1) of the NLC only speaks of registered title or interest. It is common ground that at the material date no strata title in respect of the property has been issued by the authority.

Question 1

Whether The Principle Of Beneficial Ownership Established By The Decision Of The Federal Court In Borneo Housing Mortgage Finance Berhad v. Time Engineering Berhad [1996] 2 CLJ 561; [1996] 2 AMR 1537 Applies To The Statutory Form Of Contract Prescribed By The Housing Developers Legislation.

Plaintiff's Submission

[22] Learned counsel for the plaintiff submitted that the principle of beneficial ownership established in *Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd (Formerly known as Time Engineering Sdn Bhd)* [1996] 2 CLJ 561; [1996] 2 AMR 1537 does not apply to the statutory form of contract prescribed by the Act. On the contrary, he submitted the purchaser of a housing development acquires beneficial ownership upon entering into the sale and purchase agreement in the statutory format prescribed by the Act notwithstanding that he had not paid the full purchase price for the property.

[23] Learned counsel for the plaintiff contended that the intendment of the Housing Development legislation is to provide for the protection of the interest of purchasers. That interest according to him, cannot be protected if a purchaser only obtains beneficial interest in the property "after the vendor's receipt of the full purchase price, paid timely, and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form". In support, learned counsel relied on the Singapore case of *Yeo Long Seng v. Lucky Park (Pte) Ltd* [1970] 1 LNS 174; [1971] 1 MLJ 20, where Winslow J held that:

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> The object of the Ordinance and Rules made thereunder is to control developers and to protect *bona fide* purchasers. If, therefore, a purchaser had agreed in a document such as AB2 to purchase a particular lot in question from the defendants according to the terms set out in that document, having paid a booking fee of $500, which the law has seen fit to provide as the only amount which a vendor could demand as a first deposit, and if all that remained to be done by the purchaser was to sign a document as required by the Rules, I find it difficult to understand how any complaint can be made that when the plaintiff or anybody in his situation signed the document after, at the same time, having paid the booking fee, there was no legally enforceable contract at common law, at least, between the parties.

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Learned counsel for the plaintiff also relied on the case of *Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd* [1985] 1 CLJ 541; [1985] CLJ (Rep) 266; [1985] 2 MLJ 291.

[24] Learned counsel for the plaintiff further submitted that the Act was intended to protect the interest of purchasers in accord with the principle of beneficial interest enunciated by Jessel MR in *Lysaght v. Edwards* (1875-76) 2 Ch D 499.

D

[25] It was also implored upon us by learned counsel for the plaintiff that in relying on the principle of "equity will not suffer a wrong to be without a remedy", the trial judge was right in granting injunctive relief in favour of the plaintiff to recover vacant possession. He explained that under the Torrens system of land registration, the plaintiff is not entitled to enter a private caveat to protect his interest in the property. This was due to the fact that strata title has not been issued despite the completion of the development. Thus, the NLC offered no protection to the plaintiff to prevent the second defendant from disposing the property to a related party, who then disposed it to the first defendant. Unlike the first defendant who may seek an appropriate relief against the said Mohd Ismail, the plaintiff is without any remedy against the second defendant as it is already wound up.

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[26] Learned counsel for the plaintiff further argued that the plaintiff is a *bona fide* purchaser. It was the second defendant who failed to deliver the vacant possession of the property in time under the sale and purchase agreement. Furthermore, the plaintiff did not breach any terms and conditions of the agreement. It was further submitted that, although there was a balance of RM28,000 to be paid towards the purchase price of the property, the plaintiff is entitled to set off the balance against the liquidated damages for late delivery of vacant possession of the property to the plaintiff. In support, learned counsel for the plaintiff cited *SEA Housing Corporation Sdn Bhd v. Lee Poh Choo* [1982] 1 LNS 22; [1982] 2 MLJ 31.

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First Defendant's Submission

[27] In reply, learned counsel for the first defendant contended that the principle of beneficial ownership set forth in the case of *Borneo Housing Mortgage Finance Bhd* (*supra*) applies equally to statutory form of contract prescribed by the Act. In support, he relied on three main grounds.

[28] First, he submitted that the principle of beneficial ownership is an alternate reference to a legal concept known as the doctrine of bare trust. This principle clothes a purchaser who has settled the purchase price for a property with a distinct privilege equivalent to a legal owner, although he or she has yet to be registered as proprietor of it. The beneficial or equitable owner of the property stands in the same position as the legal owner in terms of enforcing proprietorship rights against the world at large. The only difference is that the beneficial owner is yet to be vested with the legal title. Under this principle, the vendor becomes a bare trustee for the purchaser *vis-à-vis* the transacted property, while the purchaser assumes the position of beneficial owner having a right *in rem* over the property.

[29] In contrast, he submitted, a purchaser who has not settled the full purchase price does not enjoy such benefit. The right of such purchaser is purely contractual in nature. He has a right *in personam*. He or she does not have any right over the property. In the event of dispute, such purchaser can only institute action against the vendor with whom he or she has contracted. In support, learned counsel for the first defendant relied on the case of *J Raju M Kerpaya @ Jayaraman M Kerpaya v. Kwong Yik Bank Bhd & Anor* [1994] 2 CLJ 695; [1994] 2 AMR 1220 SC; *M&J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 14; [1994] 1 AMR 4; and *Borneo Housing Mortgage Finance Bhd* (*supra*)

[30] This principle of beneficial ownership, learned counsel contended, applies with equal force to a sale and purchase transaction in the statutory format as prescribed under the Act.

[31] Secondly, counsel for first defendant submitted that the legal principle governing transaction of immovable properties must reflect uniformity and consistency. It was submitted that the right to own a house is a fundamental right under art. 5(1) and art. 13 of the Federal Constitution. Therefore, it is important that the law applies equally in all cases. This is in accord with the equality principle enshrined under art. 8(1) of the Federal Constitution.

[32] Thirdly, counsel for the first defendant submitted that the principle of beneficial ownership accords distinct rights to a purchaser of a property who has fulfilled his contractual obligation under the sale and purchase agreement. He agreed that the legislative intent of the Act as well as the subsequent enactments and the subsidiary legislations is to protect the intended purchaser. However, he contended that Housing Development legislation is never intended to abrogate or undermine the rights of a purchaser under the common law or in equity.

A **Our Finding**

(i) The Principle Of Beneficial Ownership

[33] We will begin with an elucidation of the principle of beneficial ownership which we think is crucial to this case. This principle of beneficial B ownership was alluded to by Edgar Joseph JR in *Borneo Housing Mortgage Finance Bhd* (*supra*) where he observed:

> … the contractual events which result in the vendor becoming a bare trustee of the land the subject matter of the agreement of sale and purchase for the purchaser, is on completion, that is to say, C **upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form, in favour of the purchaser,** for it is then the vendor divest himself of his interest in the land.
>
> (emphasis added)

D **[34]** According to this principle, when a purchaser of a property has performed his or her contractual obligation upon the full settlement of the purchase price besides executing all the formal documents to effect the registration of ownership, equity accords him or her with all the rights and privileges of a legal owner over the property. The purchaser thus enjoys the E benefit of being the owner of the acquired property even though he or she has yet to become its registered owner.

[35] This is clearly demonstrated by the case of *J Raju M Kerpaya @ Jayaraman M Kerpaya* (*supra*), where the Supreme Court held that:

> F ... the vendor of the land is only regarded as having divested himself of the beneficial interest in his land and vested it on the purchaser at the time when the purchase money had been paid in full.

(See also *M&J Frozen Food Sdn Bhd & Anor* (*supra*) and *Peninsular Land Development Sdn Bhd v. K Ahmad* [1969] 1 LNS 124; [1970] 1 MLJ 149).

G **[36]** The principle of beneficial ownership differentiate between the rights of a purchaser of a property who has fully settled the purchase price with one who has not. This principle clothes a purchaser who has settled the full purchase price with a distinct privilege equivalent to a legal owner, although he or she has yet to be registered as the proprietor of the property.

H **[37]** Under this principle of beneficial ownership, the vendor becomes a bare trustee for the purchaser in respect of the transacted property, while the purchaser assumes the position of beneficial owner having right *in rem* over the property. The purchaser is commonly accepted as having a beneficial interest in the land on the execution of the contract and upon which specific I performance may be granted by the court. This beneficial interest is also sufficient to entitle the purchaser to enter a caveat under the NLC.

[38] On the other hand, a purchaser who has not settled the full purchase price does not enjoy such benefit. The right of such purchaser is contractual in nature and *in personam*. He or she does not have any beneficial interest in the property. In the event of dispute, such purchaser can only institute action against the vendor with whom he or she has contracted. In other words, such purchaser merely enjoys a contractual right or a right *in personam.*

[39] In short, a beneficial or equitable owner of a property stands in the same position as the legal owner in terms of enforcing proprietorship rights against the world at large. The only difference is that a beneficial owner is yet to be vested with the legal title.

(ii) The Application Of The Principle Of Beneficial Ownership

[40] In the case before us, the High Court held that the principle of bare trust as enunciated in the case of *Borneo Housing Mortgage Finance Bhd* (*supra*) discussed above does not apply because the contract entered upon by the parties was in the statutory form as prescribed by the Act.

[41] With respect, we are of the view that the principle of beneficial ownership should apply equally to both negotiated contracts as well as statutorily formatted contract. We are of the considered view that there is no valid reason to distinguish between the two transactions.

[42] We agree with counsel for the first defendant that the intention of the Act as well as the subsequent enactments and the subsidiary legislations is to merely protect the intending purchaser. It is not intended to abrogate or undermine the rights of purchaser under the common law or in equity. This is in line with the observation of the Privy Council in *City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1987] 1 LNS 62; [1988] 1 MLJ 69 PC stated:

> … the Act of 1966 and the Rules were designed to improve and supplement common law remedies and do not expressly or by implication deprive a litigant of a contractual remedy which is not dealt with under the Rules.

(see also *Raja Lob Sharuddin Raja Ahmad Terzali & Ors v. Sri Seltra Sdn Bhd* [2008] 2 CLJ 284; [2008] 2 AMR 357 CA.)

[43] Therefore, on the authorities we agree with the first defendant that the principle of beneficial ownership applies equally to a contract in a statutory format as well as a negotiated contract.

(iii) The Distinction Between Right Ad Rem Or A Right In Personam And A Right In Rem?

[44] In the present case it was a finding by the High Court that the first SPA is still valid and subsisting. The High Court did not accept the termination letter (P14) on the ground that P14 was sent by Januari Properties Sdn Bhd,

who was not a party to the first SPA. The High Court also opined that although the plaintiff had only paid RM5,250, but, it was not the reason for such termination.

[45] It was also the finding by the High Court that since the plaintiff has not fully paid the purchase price and that the strata title to the property is yet to be issued, the plaintiff has no beneficial interest over the property. Nevertheless, the High Court found that the plaintiff has acquired a legal right over the property since the first SPA is still valid and subsisting.

[46] It is trite that in a transaction involving landed property, the principle under the law of contract will govern the sale transaction until registration of title is effected under the provision of the NLC. Lord Dunedin in the case of *Hj Abdul Rahman & Another v. Mohamed Hassan* [1917] AC 209 held that:

> The agreement is valueless as a transfer or burdening instrument, but it is good as a contract.

The Privy Council in this case explained that any transaction which was not done in accordance with the then existing law relating to registration of title conferred no real right to the land but merely a contractual right.

[47] Raja Azlan Shah J (as His Lordship then was) following the Privy Council decisions in *Loke Yew v. Port Swettenham Rubber Company Limited* [1913] AC 491 and *Hj Abdul Rahman & Another* (*supra*) took a similar stand in *Kersah La'uisn v. Sikin Menan* [1964] 1 LNS 57; [1966] 2 MLJ 20 where he held that an unregistered transfer of land merely gives the purchaser a right which rests in contract.

[48] Therefore, based on the ordinary sale and purchase transaction, the purchaser will acquire, a right *ad rem* or a right *in personam*. These rights will be conferred to the purchaser immediately after contracting parties entered into a contract for the sale and purchase of property. This was explained by Thomson J, in *Bachan Singh v. Mahinder Kaur & Ors* [1956] 1 LNS 14; [1956] MLJ 97 in the following words:

> ... the point is that when that contract was made the **purchasers acquired a right *ad rem* and *in personam*** to the land which so far as the vendor was concerned they were entitled to have erected into a real right. I am not prepared to say that that amounted to an equitable right. I prefer to regard it as a legal right of the nature of a chose in action.
>
> [emphasis added]

[49] His Lordship further explained the difference between a right *ad rem* and a right *in rem*, as follows:

> To my mind, many of the difficulties which appear to arise in these cases would not arise if we were to bear in mind throughout the distinction between **rights *ad rem* or personal rights** and **rights *in rem* or real rights**. Where there is a valid binding contract for the sale of land, the purchaser,

> when he has performed his side of the contract, acquires a right *ad rem* which is also a right *in personam*. In other words, he acquires a right to the land as against the vendor personally but not good against the world as a whole and, in due course, that right can become a real right good against the world as a whole on registration in accordance with the Land Code ...
>
> [emphasis added]

(See also *Peninsular Land Development Sdn Bhd v. K Ahmad* [1969] 1 LNS 124; [1970] 1 MLJ 149; *Ong Chat Pang & Anor v. Valliappa Chettiar* [1971] 1 LNS 96; [1971] 1 MLJ 224; and *Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors* [1974] 1 LNS 175; [1974] 2 MLJ 45).

[50] Applying the above principle to the facts in the present case, we hold that the plaintiff is at best clothed with a right *ad rem* or a right *in personam* as against the second defendant upon the execution of the first SPA and payment of the sum of RM5,250 to the second defendant. The plaintiff's right rests solely in contract as against the second defendant and no cause of action could lie against the first defendant who is a complete stranger to the contract. We are supported in our view by what was said by Edgar Jospeh JR in *Borneo Housing Mortgage Finance Bhd* that:

> In our view, it is not a correct description of the relationship between parties to a contract of sale and purchase of land, ... that from the time a contract of sale and purchase of land is concluded, the vendor is a trustee for the purchaser. **At that stage, they are only parties to a contract of sale and purchase of which a court may, in certain circumstances, decree specific performance.**
>
> (emphasis added)

[51] In the present case the plaintiff is unfortunately left without remedy as the second defendant had been wound up.

iv. The Right Of The First Defendant

[52] The first defendant acquired his right through Mohd Ismail from whom he bought the property. Having paid the full purchase price, in law he assumed the position of a beneficial owner. The plaintiff claimed that Mohd Ismail is a brother to one Mohamed Yusoff bin Mohd Ibrahim, who was a director and shareholder of the second defendant developer, and thus, it is fair to assume that Mohd Ismail has actual notice of the plaintiff's interest on the property. However, we find, there is no evidence to show that the information has ever been communicated to Mohd Ismail or to the first defendant. The fact that Mohd Ismail and Mohd Yusoff are brothers does not automatically give rise to a conclusion that Mohd Ismail has had notice of the earlier SPA. Further there is not an iota of evidence to show that there had been a collusion or conspiracy between the first defendant and Mohd Ismail. On that premise, we hold that the first defendant is an innocent

A purchaser for value without notice. In the result, we agree with learned counsel for first defendant that the first defendant as the beneficial owner of the property enjoys what is referred as a right *in rem* over the property.

Conclusion

B **[53]** For the reasons set out above, our answer to first question is in the positive. On the facts of the present case, it is our finding that the plaintiff is not vested with beneficial interest in the property as he had not paid the full purchase price of the property. The plaintiff's right in the circumstances is purely contractual in nature as against the second defendant.

C **[54]** As the strata title to the property has not been issued, therefore, the proviso to sub-s. (3) of s. 340 of the NLC does not apply to the instant case. Thus, our answer to the second question is in the negative.

[55] We accordingly dismiss the appeal with costs.

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